

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.3217 OF 2002

WELCOMEGROUP SEAROCK

Land End

Bandra (East)

Mumbai-400 050.

... Petitioner

Versus

1. Mr. Kashinath Iyer

A-11/1 Shri Ram Nagar

S.V. Road, Andheri (West)

Mumbai-400 058.

2. The Member, Industrial Court

Bandra, Mumbai

having his office at New Admin.Bldg.

Bandra (East), Mumbai-400 051. ... Respondents

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Mr. Abhay Nevagi a/w Mr. Amit Singh, Ms. Prerana Patil i/b Abhay Nevagi
& Associates for the Petitioner.

Mr. Kashinath Iyer, Respondent No.1 present in person.

Respondent No.2 formal party.

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CORAM : S.C.GUPTE, J.

RESERVED ON : 26 AUGUST 2016

PRONOUNCED ON : 19 JANUARY 2017

JUDGMENT :

. This writ petition, filed under Articles 226 and 227 of the
Constitution of India, challenges a revisional order passed by the Industrial

Court at Mumbai. The dispute between the parties concerns termination of the Respondent-employee by the Petitioner-management. The management had proposed termination of the Respondent on the ground that charges of misconduct against him were found proved in a domestic inquiry. The Respondent had filed a complaint of unfair labour practice in respect of the proposed termination, which complaint was dismissed by the Labour Court. The Industrial Court by its impugned order set aside that dismissal and directed the Petitioner to allow the Respondent (who had been terminated in the meanwhile) to resume duties with continuity of service and full back wages.

2 The facts of the case may be shortly stated as follows :

2.1 The Petitioner was running a five star hotel at its establishment described in the cause title. The Petitioner had employed about 800 workmen. One of them was Respondent No.1.

2.2 It is the Petitioner's case that in 1989-1990 there were industrial relations problems in its establishment, with the Union of its workmen resorting to diverse pressure tactics including violent demonstrations at the hotel premises. On 27 January 1989, there was a physical confrontation between member employees of the Union and officials of the Hotel, in which the Health Club Manager of the Hotel was assaulted. On 13 March 1989, another murderous assault was made on the Personnel Manager of the Hotel. As a result, in or about July/August 1990, the Petitioner was constrained to file a complaint of unfair labour practice against the Union and its member employees. The Industrial Court by its order restrained the

Union and member employees from resorting to the unfair labour practices alleged. On 22 December 1990, despite the orders, there was a gate meeting outside the Hotel where provocative speeches were made. This was followed by a strike and series of violent incidents on the next date which included assaults on the officials of the Hotel. There were incidents of pelting of stones, bricks, etc. during which porch and entrance doors of the Hotel were damaged and even some guests of the Hotel were injured. It is the Petitioner's case that Respondent No.1 actively participated in these illegal activities.

2.3 It is the Petitioner's case that on 6 January 1991, at around 1200 Hours, Respondent No.1 alongwith one liftman, bell desk employee and engineer stopped an auto rickshaw carrying a guest of the Hotel in the approach to the Hotel entrance; that the passenger in the vehicle was forced to get out and walk to the Hotel. On the same date, at around 1220 Hours and 1342 Hours, two other vehicles were stopped by Respondent No.1 along with some other employees and the guests were forced to alight and walk to the Hotel.

2.4 Taking serious note of the incidents, on 9 January 1991 a charge-sheet was issued to Respondent No.1 in connection with the incidents. Respondent No.1 gave his reply to the charge-sheet.

2.5 A domestic inquiry into the charge-sheet followed, during which evidence was led by the parties. The Enquiry Officer, by his findings and report dated 30 May 1994, found Respondent No.1 guilty of the charges. In June 1994, a copy of the findings and report was forwarded by the

Petitioner to Respondent No.1 for his comments.

2.6 At that stage, apprehending termination of services, Respondent No.1 filed a complaint of unfair labour practice under the M.R.T.U. & P.U.L.P. Act, 1971 (“Act”) to the Labour Court at Mumbai.

2.7 On 20 March 1996, the Labour Court dismissed the complaint, holding the domestic inquiry held against Respondent No.1 to be fair and proper and the charges as proved.

2.8 By its letter dated 4 March 1996, the Petitioner dismissed Respondent No.1 from its services with immediate effect.

2.9. Being aggrieved by the dismissal order passed by the Labour Court, Respondent No.1 preferred a revision application before the Industrial Court at Mumbai, under Section 44 of the Act.

2.10 Vide its order dated 20 April 2002, the Industrial Court allowed the revision, set aside the impugned order of the Labour Court and directed the Petitioner to allow Respondent No.1 to resume duties with continuity of service and full back wages.

2.11 That order of the Industrial Court is challenged by the Petitioner in the present writ petition.

3 The Petitioner's challenge is based on several grounds. These include the following :

(i) The Industrial Court exceeded its jurisdiction by sitting in appeal over the findings of the Labour Court and Enquiry Officer and came to a diametrically opposite conclusion by re-appreciating the entire material afresh;

(ii) The Industrial Court was dealing only with the order of the Labour Court dismissing the Respondent's complaint and not with the termination of the latter *per se* which was a subsequent event; and

(iii) The validity of termination of services can only be decided by the Labour Court and not by the Industrial Court.

4 During the pendency of the petition, the Petitioner has declared closure of its Hotel with effect from 15 December 2006 after following due process of law. The Union and its member employees have accepted that closure by duly receiving closure compensation payable to them. There is no Hotel run at the establishment as of now. In the premises, the relief of reinstatement obviously cannot be granted. The matter may really pertain only to back wages and compensation, if any, payable to Respondent No.1. In other words, even if the revisional order of the Industrial Court is to be sustained, the relief ordered by it cannot follow. One will have to determine the date upto which back wages are payable to Respondent No.1 (involving an inquiry into whether or not Respondent No.1 was gainfully employed in the meanwhile) and possibly, also consider the compensation payable to Respondent No.1 as a result of the closure, presumably on the

footing that Respondent No.1 continued to be employed with the Petitioner upto the date of the closure. Since that is something this Court, hearing the matter for the first time, would be loath to do if it was a matter of contest, I enquired of the parties if they could arrive at a reasonable settlement agreeing to an overall compensation payable to Respondent No.1. Learned Counsel for the Petitioner offered to pay compensation of Rs.7.5 lacs. Respondent No.1, who appears in person, refused to accept this figure. He instead submitted a written note claiming compensation for the alleged acts of the Petitioner in falsely implicating Respondent No.1 and indulging in criminal acts, which are matters beyond the purview of this Court whilst hearing the present petition.

5 Faced with this peculiar situation, this Court must do its best in the interests of justice. To that end what needs to be decided first is, whether the order of the Industrial Court, insofar as it sets aside the dismissal order of the Labour Court, should be sustained. Secondly, this Court must decide, whether the relief of reinstatement and back wages was properly granted by the Industrial Court. Lastly, it falls to this Court to decide whether, and if so, in what manner, should the relief be appropriately moulded in the peculiar facts of the case.

6 The Industrial Court was hearing a revision under Section 44 of the Act from an order of dismissal passed by the Labour Court on a complaint of unfair labour practice. The Industrial Court found fault with the findings of the Labour Court and the Enquiry Officer, which were identical, on the following grounds : (i) There was no direct eye witness examined by the management for the alleged incidents of stopping of hotel

guests on the way to the hotel entrance, though there were many who were directly involved with the incidents; (ii) there was no evidence that the vehicles stopped before the hotel entrance had any hotel guests in them, who were made to alight and walk to the hotel; (iii) the security guard, who was examined by the management and, who saw the incidents from a distance, could not have possibly known that the persons stopped were hotel guests; (iv) the guests, who were allegedly stopped, were not even named or shown to be guests of the hotel. On these considerations, the Industrial Court came to the conclusion that no prudent man could have come to the conclusion that the employee's alleged misconduct of obstructing hotel guests was proved. I do not find anything wrong with this conclusion. Mr. Nevagi, for the Petitioner, submits that the provisions of Section 44 of the Act are almost in *pari materia* with the provisions of Article 227 of the Constitution of India and whilst exercising jurisdiction thereunder the revisional Court is not expected to appreciate or re-appreciate the materials on record. He relies on the judgments of our Court in **Vithal Gatlu Marathe Vs. MSRTC**¹ and **APMC Arjuni Moregaon Vs. Ashok Danaji Hatzode**² and the judgment of the Supreme Court in the case of **N. Rajarathinam Vs. State of Tamil Nadu**³, in this behalf. What the revisional Court has done here does not appear to be fresh re-assessment of evidence as an appeal court is expected to do, but finding of fault with the impugned judgment of the trial court on the ground of perversity. The conclusion of the revisional court is a pre-eminently possible conclusion. This Court, in its jurisdiction under Articles 226 and 227 of the Constitution, cannot, in the premises, interfere with the

1 (1996) ILLJ 494 Bom

2 WP No.5907 of 2005 and WP No.1311, dated 21 & 22 January 2015

3 SLP, dated 6 September 1996

revisional judgment.

7 The first hurdle being thus cleared, I must next turn to the relief granted by the Industrial Court. Mr. Nevagi, learned Counsel for the Petitioner, argues that the Industrial Court was merely examining the dismissal of the Respondent's complaint by the Labour Court and not the termination of the Respondent's service, which was a subsequent event. I am afraid that is a rather hyper-technical approach, least of all suited to the jurisdiction exercised by an industrial adjudicator. What the adjudicator was examining in the present case was a complaint of unfair labour practice in the matter of a proposed termination, which was said to be based on perverse inquiry findings. The adjudicator found the findings to be perverse, that is to say, incapable of sustaining any possible termination. If in the meanwhile, the employer actually proceeds to effect such termination, surely the adjudicator has the requisite power and authority to set it right. He cannot say that he would hold the prospective termination to be unsustainable and yet not pass an order for resumption of duties in the face of an accomplished termination in the interregnum. He cannot possibly relegate the workman to a fresh round of litigation by formally challenging his termination, when the entire basis of such challenge is actually found by the adjudicator to be in favour of the challenger workman.

8 In the premises, there is nothing wrong with the relief of reinstatement and continuity of service. The same, however, cannot be said for the relief of full back wages. The termination was as of 4 March 1996. The order of reinstatement or resumption of duties was passed on

20 April 2002. There was no examination in it of the question of gainful employment of the Respondent during the interregnum. Mr. Nevagi, in this behalf, relies on the cases of **Sadanand Patankar Vs. Messrs. New Prabhat Silk Mills (No.2) Bombay**⁴ and **Reetu Marbles Vs. Prabhakant Shukla**⁵ and submits that the facts about employment or non-employment being within the special knowledge of the employee, it is for him to prove those facts. The law in this behalf is well settled. As explained by our Court in the case of **Sadanand Patankar** (supra), it is obligatory for the industrial adjudicator to frame and decide the point whether the employee is entitled, upon his reinstatement, to back wages or not like any other point, irrespective of whether or not the parties have raised the same. Failure to do so will be tantamount to failure to exercise jurisdiction. In the absence of determination of that issue, the order either granting or refusing back wages will be void. The initial burden of showing want of gainful employment is on the employee. This, however, may not be a heavy burden; he may simply discharge it by deposing to his lack of gainful employment between the date of his termination and his reinstatement. It will then be for the employer to adduce evidence that the employee was actually gainfully employed. Nothing of this has happened before the Courts below. That calls for a remand and fresh hearing.

9 There is one more reason why there must be a remand for determining the monetary compensation payable to Respondent No.1. As I have noted above, the only relief now possible is of monetary compensation since there is a closure of the undertaking in the meanwhile. Such compensation must reflect back wages payable upto the date of

4 (1974) 76 Bom LR 437

5 AIR 2010 SC 397

closure and closure compensation payable to the employee at the date of closure and interest, if any, payable thereafter upto the date of actual payment. There is dispute between the parties as to what is the date of the closure, that is to say, upto what date should wages be calculated. Then, there would be the matter of determining the last drawn wages as of the date of closure, and calculation of actual compensation payable on that basis. Add to this are further complications due to an offer of VRS on the part of the Petitioner establishment, which was accepted by the Union and its member-employees. The Respondent may well be entitled to receive the same compensation that was paid to other employees for voluntary retirement under the VRS. These are all matters of dispute and may require a proper hearing.

10 All the same, the employee in the present case must get some compensation as of today, even if his last drawn salary may be a matter of debate. There is no reason why closure compensation or VRS compensation, whichever is higher, ought not to be paid to him and possibly, also a part of his claim of back wages, whatever be the actual date upto which such wages may be payable. The Petitioner has furnished a without prejudice statement of particulars of backwages and compensation (including VRS benefits) payable to Respondent No.1. (The statement is placed on record marked "A" for identification). According to this statement, the backwages and compensation, assuming the same are payable, work out to Rs.7,61,735=28 and Rs.7,24,258=28, respectively, aggregating to Rs.14,85,993=28. Though Respondent No.1 does not admit these figures, they may certainly be made the basis for moulding the relief including working out of ad-hoc compensation payable upfront to

Respondent No.1. In the meanwhile, in pursuance of an interim order passed by this Court, a sum of Rs.3,92,323=00 was deposited by the Petitioner in Court towards back wages payable to Respondent No.1. A sum of Rs.1,96,162=00 from out of this amount has been withdrawn by Respondent No.1. The balance amount, which has been invested, is approximately in the region of Rs.6 lacs as of date considering the accrued interest thereon.

11. In these facts and for all the reasons discussed above, I may dispose of the petition in terms of the following order and it is, accordingly, ordered as follows :

(i) The impugned judgement and order of the Industrial Court dated 20 April 2002, insofar as it allows Revision Application (ULP) No.40 of 1996, and quashes and sets aside the judgment of the 12th Labour Court dated 2 March 1996 in Complaint (ULP) No.85 of 1994, is sustained;

(ii) The directions for resumption of duties with continuity of service and full back wages contained in the impugned judgment and order, are set aside and the matter is remanded to the Labour Court at Mumbai for determination of back wages and compensation payable to Respondent No.1;

(iii) The Registrar of Industrial Court shall allow

Respondent No.1 to withdraw the entire amount deposited by the Petitioner together with accrued interest thereon;

(iv) The Petitioner shall pay an ad-hoc sum of Rs.4 lacs to Respondent No.1 within 6 weeks from today towards back wages and compensation payable to the latter pending determination of the quantum of such wages and compensation in accordance with clause (ii) above;

(v) The payments made to Respondent No.1 according to clauses (iii) and (iv) above shall be adjusted towards the back wages and compensation found payable by the Labour Court after hearing the parties;

(vi) In addition to the sum of Rs.4 lacs to be paid to Respondent No.1 as per clause (iii) above, the Petitioner shall deposit a sum of Rs.3 lacs in the Labour Court towards the final monetary relief to be determined by that Court in accordance with this order;

(vii) The Registrar of the Court shall invest this amount in a fixed deposit of a nationalized bank initially for a period of one year and thereafter to be renewed from time to time and to abide by the final orders that may be passed by the Labour Court;

(viii) Respondent No.1 shall be entitled at any time to accept this amount, together with accrued interest thereon, if any, towards full and final settlement of his balance claim of back wages and compensation over and above the payments mentioned in clauses (iii) and (iv) above.

(ix) No order as to costs.

(S.C.GUPTE, J.)